STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1444

State of Minnesota,
Respondent,

vs.

Roger Alen Gutzke,
Appellant.

Filed August 28, 2023
Affirmed in part, reversed in part, and remanded
Ross, Judge

McLeod County District Court
File No. 43-CR-21-1870

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Ryan S. Hansch, McLeod County Attorney, Steven R. Ott, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

SYLLABUS

A motorist does not "read an electronic message" as prohibited under Minnesota Statutes section 169.475, subdivision 2(a)(1) (2020), or "engage in a cellular phone call" as prohibited under subdivision 2(a)(2) (2020), by picking up his cellphone and viewing the caller-identification information of an incoming call.

OPINION

ROSS, Judge

Roger Gutzke was driving his semitruck carrying a load of soybeans when he pulled out his ringing cellphone to glance at it and identify the caller—"spam." The distraction caused Gutzke to veer off the roadway, tip his truck over in the ditch, and spill his cargo of beans. Gutzke challenges his consequent convictions of driving with a suspended license and operating a motor vehicle while using a cellular device. He contends that the legislature's 2021 amendment to the driver's-license-suspension statute applies to his case and that the amelioration doctrine mandates that his driving-while-suspended conviction be vacated. And he contends that the evidence is insufficient to support his conviction of driving while using a cellular device because his conduct of glancing at his cellphone is not prohibited by Minnesota Statutes section 169.475, subdivision 2 (2020). Because the legislature's 2021 amendment to the driver's-license-suspension statute did not decriminalize driving with a suspended license, Gutzke's amelioration argument fails. But because his conduct does not violate the prohibitions listed in section 169.475, subdivision 2, we reverse his conviction for operating a motor vehicle while using a cellular device. We remand for the district court to vacate that conviction.

FACTS

Roger Gutzke loaded his semitruck with soybeans in October 2021, intending to drive a short distance from his home outside Glencoe to trade his beans at the United Farmers Cooperative in Brownton. On his way, his cellphone began to ring. Gutzke pulled out the phone to see who was calling. He glanced at it and recognized the call as "spam,"

and he did not answer it. His reaction to the call nevertheless distracted him from driving, and his truck veered off the road and dropped into the ditch. Gutzke tried to drive the truck out of the steep ditch, causing it to tip over and spill the haul of beans. McLeod County sheriff's deputies Ken Reynolds and Brandon Maloney arrived to investigate, and firefighters helped Gutzke out of the toppled cab of his truck.

The state charged Gutzke with driving with a suspended license and operating a motor vehicle while using a cellular device. Deputy Reynolds testified at the trial. He recounted that he overheard the 75-year-old Gutzke tell firefighters that "he had been driving down the road and he went [to] answer his cellphone, and when he went to answer his phone he veered a little bit and being a semitruck he got in that soft gravel and [it] pulled him down into the ditch and ended up overturning." Deputy Maloney testified that he interviewed Gutzke shortly after the crash, and the district court received the recording and transcript of that interview. During the interview, Gutzke described what happened before he veered off the road. He acknowledged that he had a cellphone on his person and explained, "I looked down to see my phone because the son of a bitch was ringin, and I pulled it out and seen it was a damn [spam caller;] them son of a bitches." He added, "That's when I went over to the grass."

A representative of the Minnesota Department of Public Safety testified that Gutzke's license had been suspended since August 15, 2021, for failing to pay a fine for speeding. She told the jury that the license remained suspended on October 8, 2021, when Gutzke tipped his truck in the ditch. The state corroborated the testimony by producing a portion of Gutzke's driving record.

The jury found Gutzke guilty of both offenses. The district court sentenced him to 45 days in jail for driving with a suspended license and imposed an $85 fine for using a cellular device while operating a motor vehicle. Gutzke appeals.

ISSUES

I. Does the amelioration doctrine require reversal of Gutzke's conviction for driving with a suspended license?

II. Did the state produce sufficient evidence to convict Gutzke of operating a motor vehicle while using a cellular device?

ANALYSIS

Gutzke contends that a 2021 legislative amendment triggers the amelioration doctrine, requiring us to reverse his conviction of driving with a suspended license. He also contends that the trial evidence was insufficient to support his conviction of operating a motor vehicle while using a cellular device. Only his second argument prevails.

I

Gutzke's amelioration-doctrine argument is not convincing. The common-law amelioration doctrine "establishes a presumption in Minnesota that an amendment mitigating punishment applies to non-final cases." *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017). Whether the amelioration doctrine applies is a question of law that we review *de novo*. *State v. Loveless*, 987 N.W.2d 224, 238 (Minn. 2023). The doctrine applies if three requirements are met: "(1) there is no statement by the Legislature that clearly establishes its intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered when the amendment takes

effect." *Id.* The doctrine clearly does not apply here because the amendment Gutzke relies on does not mitigate punishment for the crime of his conviction.

Gutzke contends that his conviction of driving with a suspended license must be vacated under the amelioration doctrine based on the legislature's 2021 amendment to the driver's-license-suspension statute. Before its amendment, Minnesota Statutes section 171.16, subdivision 3 (2020), mandated that the commissioner of public safety, upon notice from the court that certain prerequisites are met, "shall suspend the driver's license" of any person who has not paid a fine or surcharge resulting from a traffic or parking offense. The legislature amended the statute in 2021, prohibiting the commissioner "from suspending a person's driver's license based solely on the fact that a person" has refused or failed to pay a fine or surcharge stemming from a traffic or parking offense. 2021 Minn. Laws 1st Spec. Sess. ch. 5, art. 4, § 78, at 61 (codified at Minn. Stat. § 171.16, subd. 3 (2022), effective January 1, 2022). An essential step in establishing that a statutory amendment mitigates a defendant's punishment is showing that the "defendant [was] convicted under [the] statute" that was amended. *State v. Otto*, 899 N.W.2d 501, 503 (Minn. 2017) (quotation omitted); *see also Kirby*, 899 N.W.2d at 495 (surveying cases that looked at "the *specific* provision affecting the criminal defendant" when applying the amelioration doctrine). The problem with Gutzke's amelioration argument is that the amendment he relies on changed only the circumstance *resulting in* a suspended license; it did nothing to reduce the *penalty for driving after* a license suspension in violation of Minnesota Statutes section 171.24, subdivision 1 (2020), Gutzke's crime of conviction. And unlike the circumstances of *Loveless*, where the legislature decriminalized Loveless's conduct by amending a statute

distinct from his statute of conviction, the legislature's amendment of section 171.16, subdivision 3, mitigates no punishment for violating the criminal prohibitions established in section 171.24, subdivision 1. *See Loveless*, 987 N.W.2d at 242–44. Because the legislature's amendment did not mitigate the punishment for driving with a suspended license, the amelioration doctrine provides no ground for us to vacate Gutzke's conviction for violating that statute.

II

Gutzke next argues that the state failed to provide sufficient evidence to support his conviction of operating a motor vehicle while using a cellular device. The argument draws our attention to an inconsistency in the record between the conduct underlying the state's charge, the jury's guilty verdict, and the district court's conviction. The statute at issue—Minnesota Statutes section 169.475, subdivision 2—generally prohibits a motorist from interacting with his cellphone while operating a motor vehicle. The state charged Gutzke specifically under subdivision 2(a)(1), which prohibits a motorist "from using a wireless communications device to . . . initiate, compose, send, retrieve, or read an electronic message" while a motor vehicle is in motion or in traffic. But the district court instead instructed the jury on, and the jury found Gutzke guilty of violating, subdivision 2(a)(2), which prohibits a motorist "from using a wireless communications device to . . . engage in a cellular phone call, including initiating a call, talking or listening, and participating in video calling" while the vehicle is in motion or in traffic. And the district court's sentencing order cites subdivision 2(a)(1) as the statute of conviction. The record does not reveal how the discrepancy occurred, and the parties do not explain it. We need not attempt to resolve

any potential issue the discrepancy creates, however, because the evidence was insufficient to convict Gutzke under either subdivision.

We turn to the merits of Gutzke's argument that the trial evidence was insufficient to support a conviction for operating a motor vehicle while using a cellular device. When an appellant challenges the sufficiency of the evidence, we generally review the record "to determine whether the evidence, when viewed in the light most favorable to the conviction," permitted the jurors to conclude that the defendant was guilty beyond a reasonable doubt. *Loveless*, 987 N.W.2d at 246 (quoting *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012)). But when an appellant contends, as Gutzke contends, that the evidence is insufficient because his conduct does not violate the statute of conviction as a matter of law, we interpret the statute *de novo*. *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017). Our *de novo* analysis begins and ends with the meaning and application of the unambiguous language of Minnesota Statutes section 169.475 (2020). Interpreting the statute and applying it in the context of Gutzke's conduct, we conclude that Gutzke did not violate subdivision 2.

The statute is unambiguous, a condition that orients our interpretation. We interpret statutes to discern legislative intent. *State v. Velisek*, 986 N.W.2d 696, 699 (Minn. 2023). When the statutory language is clear and unambiguous on its face, we will apply its plain meaning. *Id.* at 700; Minn. Stat. § 645.16 (2022). We can determine the plain meaning of statutory words and phrases by construing them according to the rules of grammar and common usage based on their context, their statutory definitions, and, if necessary, dictionary definitions. *State v. Morgan*, 968 N.W.2d 25, 30 (Minn. 2021); *State v.*

Overweg, 922 N.W.2d 179, 183 (Minn. 2019). Under this framework, the two operative subdivisions here are not difficult to interpret and apply to Gutzke's conduct.

A cursory reading of subdivision 2(a)(1) may suggest that Gutzke's conduct of looking at his ringing cellphone to identify the caller violates the statute. That subdivision prohibits a driver from "initiat[ing], compos[ing], send[ing], retriev[ing], or read[ing] an electronic message." One might suppose that caller-identification information constitutes "an electronic message," and that supposition finds initial apparent support in the legislature's general definition of the term:

> [A] self-contained piece of digital communication that is designed or intended to be transmitted between physical devices. An electronic message includes, but is not limited to: email; a text message; an instant message; a command or request to access a web page; a voice mail message; a transmitted image; transmitted video content, including through video calling; transmitted gaming data; and other data transmitted using a commonly recognized electronic communications protocol.

Minn. Stat. § 169.475, subd. 1(b). But the legislature continued defining "electronic message" by listing specific *exclusions* from it:

> An electronic message does not include: voice or audio data transmitted as a result of making a phone call; data transmitted between a motor vehicle and a wireless communications device located in the vehicle; data transmitted by a two-way radio, citizens band radio, or amateur radio used in accordance with Federal Communications Commission rules and regulations; or *data transmitted automatically without direct initiation by a person*.

Id. (emphasis added). The trial evidence established that Gutzke picked up his cellphone to identify who was calling him and that, in doing so, he saw that it was a spam caller. We

can assume that this information might otherwise fit the catch-all category of the "electronic message" definition in that it is arguably "other data transmitted using a commonly recognized electronic communications protocol." But it cannot constitute an electronic message if it is also "data transmitted automatically without direct initiation by a person." And it is this exclusion that prevents Gutzke's conviction under subdivision 2(a)(1).

We observe that the state presented no evidence that the caller-identification data was transmitted to Gutzke's cellphone by direct initiation of any person. And it is apparent to us that caller-identification information is not data that *the caller* directly initiates. It instead fits the statutory exclusion of, "data transmitted automatically without direct initiation by a person." When a caller initiates a call to another person, the caller's cellphone-service provider transmits the caller's identification data to the recipient's cellphone-service provider. *See* 47 C.F.R. § 64.1601 (a)(1) (2022) (requiring telecommunications providers "to transmit the calling party number" to "interconnecting providers"); *see also Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 297–98 (5th Cir. 2003) (describing generally the caller-identification process). The recipient's service provider then transmits this data to the recipient's cellphone, displaying the caller's number or other identifying information on the screen. *See Bell Atl. Corp.*, 339 F.3d at 297. This immediate and automated process is initiated directly by neither the caller nor the recipient. The caller certainly does not *directly* initiate the transmission of data that identifies the source of the call. In other words, although a caller may directly initiate the call that triggers the service providers to exchange the data with each other, the visual data transmitted to the recipient's

phone is, at most, only *indirectly* initiated by the caller. The caller-identifying data that Gutzke viewed on his cellphone is therefore not an "electronic message" under Minnesota Statutes section 169.475, subdivision 1(b), and so it cannot supply the basis to convict him of reading an "electronic message" while operating a motor vehicle under subdivision 2(a)(1).

The evidence is also insufficient to support the conviction under subdivision 2(a)(2) because Gutzke did not "engage in a cellular phone call" as the legislature describes that conduct. "Engag[ing] in a cellular phone call" includes "initiating a call, talking or listening, and participating in video calling." Minn. Stat. § 169.475, subd. 2(a)(2). The evidence does not indicate that Gutzke did any of those things. He instead pulled out his cellphone and looked at the identifying information without talking or listening. And although the legislature did not specifically define the word "engage," our understanding of the word informs us that Gutzke did not otherwise "engage in a cellular phone call" when he picked up his phone to see who was calling. *See Black's Law Dictionary* 669 (11th ed. 2019) (defining "engage" as "[t]o employ or involve oneself; to take part in"); *The American Heritage Dictionary of the English Language* 591 (5th ed. 2011) (defining "engage" as "[t]o involve oneself or become occupied; participate"). Gutzke was acting only to determine *whether* to engage in the call. Although his actions distracted him and, in fact, resulted in a consequence the legislature clearly sought to avoid by penalizing cellphone use while driving, his conduct is not prohibited by the version of the statute in effect at the time of the collision.

We are not persuaded otherwise by the state's argument that, even if Gutzke did not commit any of the acts stated in subdivision 2(a)(2), the subdivision lists offending conduct inclusively rather than exhaustively and the legislature intended to criminalize even picking up a cellphone under this provision. The state relies on subdivision 3(a) exceptions that exempt a driver from punishment under subdivision 2 if the person uses only his cellphone's hands-free feature. The argument cannot overcome two related obstacles. The first is that we read criminal statutes strictly, because only conduct that the legislature has clearly identified as criminal can warrant punishment. *United States v. Lanier*, 520 U.S. 259, 265–66 (1997) (explaining the need to strictly construe criminal statutes as a matter of due process to ensure that persons are fairly warned about conduct for which they might be held criminally liable). And second, the legislature urges us to follow the unambiguous language stated in a statute rather than base our understanding on what we might discern to be the spirit that underlies it. Minn. Stat. § 645.16; *see also State v. Riggs*, 865 N.W.2d 679, 682 (Minn. 2015). The state's argument therefore fails.

We add that the legislature passed an amendment to Minnesota Statutes section 169.475, subdivision 2, during the pendency of this appeal. The subdivision now prohibits a motorist from even "holding a wireless communications device with one or both hands" while operating a motor vehicle. 2023 Minn. Laws ch. 68, art. 4, § 50 (to be codified at Minn. Stat. § 169.475, subd. 2(a)(1) (Supp. 2023)). When the legislature amends a statute, we presume that it intended to change the law. *Braylock v. Jesson*, 819 N.W.2d 585, 588 (Minn. 2012). The amendment prohibiting handling a cellphone while driving would be

unnecessary if the state were correct that the pre-amended statute already criminalized the conduct.

DECISION

Because the legislature's amendment to the driver's-license-suspension statute did not mitigate punishment for driving with a suspended license, the amelioration doctrine does not apply to Gutzke's conviction of driving with a suspended license. But because the state's evidence did not establish that Gutzke's cellphone use violated Minnesota Statutes section 169.475, subdivision 2(a)(1) or 2(a)(2), we reverse that conviction without addressing Gutzke's other arguments. We remand for the district court to vacate the cellphone-use conviction.

Affirmed in part, reversed in part, and remanded.